A **AHMAD MUKAMAL ABDUL WAHAB & ORS**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: C-05-44-2011]
C 19 APRIL 2013

CRIMINAL LAW: *Dangerous Drugs - Trafficking in dangerous drugs - Appeal - Appeal against conviction and sentence - Drug trafficking - Dangerous Drugs Act 1952, s. 39B(1)(a) - Three accused charged,*
D *convicted and sentenced for drug trafficking - Whether evidence implicated all three accused*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Drug trafficking - Dangerous Drugs Act 1952, s. 39B(1)(a) -*
E *Three accused charged, convicted and sentenced for drug trafficking - Whether evidences implicated all three accused - Whether second accused had possession, custody and knowledge of drugs*

EVIDENCE: *Statement - Cautioned statement - Whether cautioned statement by second accused exonerated liability - Whether trial judge had*
F *considered cautioned statement - Whether second accused had possession, custody and knowledge of drugs*

Upon receiving information that a certain drug trafficking transaction would take place, SP6 instructed SP8 to act as an
G agent provocateur. The ambush took place near a restaurant where SP8 had met up with the second appellant and was later joined by the third appellant who arrived in a car and waited outside the restaurant. SP7 had followed the third appellant's car and testified that there were two people inside. While the second
H appellant was talking to the third appellant, the police party sprung into action and ambushed the appellants. SP6 saw the first appellant throwing out a packet which was later confirmed to contain drugs. In the High Court, the three appellants were charged for trafficking in dangerous drugs under s. 39B(1)(a) of
I the Dangerous Drugs Act 1952 ('DDA'). The second appellant, in denying knowledge of the drug trafficking transaction, made a cautioned statement ('exh. D1') that on the said day, the third appellant had driven her to the restaurant and left her there for

half an hour, before coming back with the first appellant. According to the second appellant, the third appellant had passed her a mobile phone and instructed her to call the number in the phone, to meet him up and inform him that 'barang tak boleh naik, kalau nak, jumpa di tol Gombak'. In the present appeals, the appellants appealed against their convictions and sentences.

Held (allowing second appellant's appeal; dismissing first and third appellants' appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) It was clear that the first and third appellants were caught red-handed with the drugs sufficient to attract a charge under s. 39B(1)(a) of the DDA. There was no favourable evidence to rebut the charge on balance of probabilities. However, there was no evidence implicating the second appellant in the offence. The conviction and sentence against the second appellant was set aside and the second appellant was acquitted and discharged. The first and third appellants' convictions and sentences were affirmed. (paras 5, 6 & 14)

(2) The trial judge failed to consider exh. D1 which would exonerate liability. There was nothing inherently incredible about the second appellant's story which lacked elements of the offence, in particular, custody, control and knowledge. Had the trial judge applied maximum evaluation test at the prosecution stage in respect of the elements of the offence, the defence ought not to have been called for the second appellant. If the trial judge had properly addressed his mind to the maximum evaluation and beyond reasonable doubt test at the end of the defence case, the only result would be an acquittal for the second appellant. (paras 6 & 7)

(3) The hallmark of any criminal judgment in the administration of criminal justice depends largely on weighing the defence story in the right perspective with that of the evidence of the prosecution. This is in accordance with the special constitutional protection prescribed under art. 5(1) of the Federal Constitution. Although the prosecution had fairly and justly weighed the evidences of the first and third appellants' defence to reach a just result, the judgment in respect of the second appellant was in breach of the principles enshrined in *Mohamad Radhi Yaakob v. PP.* (paras 10 & 13)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Setelah menerima maklumat bahawa suatu transaksi pengedaran dadah akan dijalankan, SP6 telah mengarahkan SP8 untuk menyamar sebagai ejen perangkap. Serangan hendap tersebut
B dijalankan berdekatan sebuah restoran di mana SP8 telah bertemu dengan perayu kedua dan kemudiannya disertai oleh perayu ketiga yang tiba dengan sebuah kereta dan menunggu di luar restoran tersebut. SP7 telah mengekori kereta perayu ketiga dan memberi keterangan bahawa terdapat dua orang di dalamnya. Sementara
C perayu kedua sedang bercakap dengan perayu ketiga, pasukan polis tersebut bertindak dan menangkap perayu-perayu. SP6 telah nampak perayu pertama membuang sebuah bungkusan yang kemudiannya disahkan mengandungi dadah. Di Mahkamah Tinggi, ketiga-tiga perayu didakwa mengedar dadah berbahaya di bawah
D s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Perayu kedua, dalam menafikan pengetahuan mengenai transaksi pengedaran dadah, membuat pernyataan beramaran ('eks. D1') bahawa pada hari kejadian, perayu ketiga telah memandunya ke restoran tersebut dan meninggalkannya di sana selama setengah jam, sebelum
E kembali semula dengan tertuduh pertama. Menurut perayu kedua, perayu ketiga telah memberikannya sebuah telefon bimbit dan mengarahkannya untuk menelefon nombor dalam telefon tersebut, bertemu dengan seorang lelaki dan memberitahunya bahawa 'barang tak boleh naik, kalau nak, jumpa di tol Gombak. Dalam
F rayuan ini, perayu-perayu merayu terhadap sabitan dan hukuman.

Diputuskan (membenarkan rayuan perayu kedua; menolak rayuan perayu pertama dan ketiga)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

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(1) Adalah jelas bahawa perayu pertama dan ketiga diperangkap dengan dadah yang cukup untuk menarik pertuduhan di bawah s. 39B(1)(a) ADB. Tiada keterangan yang kukuh untuk menangkis pertuduhan pada imbangan kebarangkalian. Walau
H bagaimanapun, tiada bukti yang mengaitkan tertuduh kedua dengan kesalahan tersebut. Sabitan dan hukuman terhadap perayu kedua diketepikan dan perayu kedua dilepaskan dan dibebaskan. Sabitan dan hukuman perayu pertama dan ketiga disahkan.

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(2) Hakim bicara gagal mempertimbangkan eks. D1 yang mana akan melucutkan liabiliti. Tiada apa yang luar biasa tentang cerita perayu kedua yang tidak mengandungi elemen-elemen kesalahan tersebut, khususnya, jagaan, kawalan dan pengetahuan. Sekiranya hakim bicara mengguna pakai ujian penilaian maksimum pada peringkat pendakwaan berkenaan dengan unsur-unsur kesalahan, pembelaan tidak sepatutnya dipanggil bagi perayu kedua. Jika hakim bicara telah mengarahkan fikirannya dengan betul kepada penilaian maksimum dan ujian keraguan munasabah di akhir kes pembelaan, satu-satunya dapatan adalah pembebasan bagi perayu kedua.

(3) Pencapaian penghakiman jenayah dalam pentadbiran keadilan jenayah bergantung kepada pertimbangan pembelaan dalam perspektif yang betul dengan keterangan pendakwaan. Ini adalah sejajar dengan perlindungan khas perlembagaan yang ditetapkan di bawah perkara 5(1) Perlembagaan Persekutuan. Walaupun pihak pendakwaan telah secara adil dan saksamanya mempertimbangkan keterangan-keterangan perayu pertama dan ketiga untuk mencapai keputusan yang adil, penghakiman berkenaan dengan perayu kedua adalah melanggar prinsip-prinsip yang termaktub dalam kes *Mohamad Radhi Yaakob v. PP*.

Case(s) referred to:

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 HC ***(refd)***

Sochima Okoye v. PP [1995] 3 CLJ 371 CA ***(refd)***

Thenegaran Murugan v. PP [2013] 2 MLJ 855 ***(refd)***

Tong Kam Yew & Wang Wee Cheng v. PP (Cri A No. B-05-63-2011) (Unreported) ***(refd)***

Zulkifli Md Rozi v. PP (Cri A No. P-05-424-2010) (Unreported) ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 182A

Dangerous Drugs Act 1952, ss. 34, 39B(1)(a)

Federal Constitution, art. 5(1)

For the appellant - Bernard George; M/s Tay, Bernard & Cheong Hanif Hassan; M/s Hanif Hassan & Co

For the respondent - Shoba Venu Gobal; DPP

[Appeal from High Court, Temerloh; Trial No: 45A-16-2010]

Reported by Najib Tamby

A

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] We heard all the three appeals of the appellants/accused on 11 January 2013 and on the same day dismissed the 1st and 3rd appellants' appeal and allowed the 2nd appellant's appeal. My learned brothers Mohamed Apandi bin Haji Ali JCA and Linton Albert JCA have read the judgment in draft form and approved the same. This is our judgment in respect of appeal No: C-05-44-2011. It must be noted that there is only one appeal number for all the three appeals.

Brief Facts

[2] The appellants were charged for trafficking dangerous drugs under s. 39B(1)(a) DDA 1952, to be read with s. 34. The said charge reads as follows:

> Bahawa kamu bersama-sama pada 9-3-2010, lebih kurang jam 12:30 tengah malam, di kawasan tempat letak R & R Genting Sempah, dalam daerah Bentong, di dalam Negeri Pahang, telah didapati mengedar dadah berbahaya jenis cannabis seberat 4,521 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] The main witnesses were SP8, SP6 and SP7 for the prosecution who were the police officers, and were involved in trapping the appellants. SP6 was instrumental in contacting the source person, called Shah to come to Genting Sempah to purchase five kilos of cannabis. SP6 instructed SP8 to be an agent provocateur for purpose of purchasing the cannabis. SP6 saw SP8 and source entering McDonald restaurant and about 10.30pm saw a woman entering the McDonald restaurant (later identified as 2nd appellant).

[4] Subsequently the 2nd appellant, the source and SP8 came out of the restaurant and later the source moved away leaving SP8 and 2nd appellant. Later a Kancil car came, and SP6 saw SP8, the 2nd appellant and the driver of the Kancil later identified as the 3rd appellant. After that the car moved away leaving SP8 and the 2nd appellant. SP7 had followed the car and he was said to have seen two people in the car. SP6 says he saw

the car returning to the place SP8 and 2nd appellant was standing and the 2nd appellant spoke to the driver. SP6 then saw the signal from SP8 to take action. And SP6 saw the passenger in the car, later identified as 1st appellant throw a packet. All the three appellants were arrested and SP6 seized the packet which contained the drugs.

[5] From the evidence led by the prosecution it was clear that the 1st and 3rd appellants were caught red handed with the drugs sufficient to attract a charge under s. 39B(1)(a) DDA 1952. And we have perused the whole of the record of appeal to see whether there was any favourable evidence to rebut the charge on balance of probabilities. We find none.

[6] In respect of the 2nd appellant, we do not find any evidence implicating her and the only evidence is the oral testimony of SP8. The learned trial judge though in our view correctly assessing the evidence as a whole failed to consider exh. D1, the caution statement of the 2nd appellant which exonerates liability. In consequence the judgment against the 2nd appellant attracts the jurisprudence relating to perverse judgment and also must be seen to be in breach of s. 182A of the CPC. (see *Tong Kam Yew & Wang Wee Cheng v. PP*, Cri A No: B-05-63-2011 (unreported)). The said caution statement *inter alia* reads as follows:

S. Bagi menjawab soalan saya.

J. Saya dilahirkan di Penggerang dan dibesarkan di Felda Lok Heng dalam keluarga yang kucar kacir. Saya bersekolah hanya sehingga darjah enam kemudian saya bekerja di kebun buah-buahan di Punggai, Kota Tinggi Johor. Pada tahun 2000 saya ke Kuala Lumpur untuk mencari pekerjaan baru. Saya telah dapat pekerjaan di Pusat Karaoke Goldmine Maluri Cheras Kuala Lumpur sehingga tahun 2002. Kemudian saya bekerja di Pusat Pendandan Rambut di Cheras sehingga tahun 2003, kemudian saya berhenti kerja dan tinggal dengan teman lelaki saya bernama Shawal bin Hashim, yang menyara kehidupan saya. Pada tahun 2009 saya bekerja sambilan membantu menguruskan akaun perniagaan sayur Shawal bin Hashim sehingga saya ditangkap polis.

S. Ceritakan kepada saya mengapa kamu ditangkap oleh pihak polis?

J. Pada 08/03/2010 jam lebih kurang 2 petang saya keluar rumah di Kg. Puah bersama Shawal bin Hashim untuk menguruskan hal Insuran di Am Insuran di berdekatan Gombak, seterusnya menguruskan hal pernikahan saya dengan Shawal bin Hashim di pejabat Agama Bangsar Kuala Lumpur. Selesai urusan saya, jam lebih kurang 9 malam Shawal bin Hashim telah membawa saya ke kawasan rehat Genting Sempah dengan kenderaan Perodua Kancil. Sampai di Genting Sempah dia telah tinggalkan saya di McDonald Genting Sempah dan dia terus beredar meninggalkan saya, lebih kurang setengah jam kemudian Shawal telah muncul semula di kawasan rehat Genting Sempah bersama seorang kawan lelaki yang saya kenali bernama Boy. Seketika kemudian semasa saya berada berhampiran dengan kereta Perodua tersebut berlaku pergelutan dalam kereta dan polis telah ramai mengepung kereta yang dinaiki Shawal dan Boy, kemudian seorang polis wanita telah menangkap saya dan memasang gari pada tangan saya. Saya ditangkap polis kerana saya datang ke Genting Sempah bersama Shawal bin Hashim yang membawa dadah ganja di dalam keretanya.

S. Adakah kamu tahu mengapa kamu ditangkap polis?

J. Tahu, saya ditangkap polis kerana bersama Shawal dengan Boy yang disyaki mengedar dadah ganja.

S. Di mana polis jumpa dadah ganja itu?

J. Saya tak tahu dan saya tak pasti di mana dadah itu dijumpai.

S. Dadah ganja yang polis jumpa itu kepunyaan siapa?

J. Saya tak pasti, mungkin kepunyaan Boy kerana semasa saya dating dengan Shawal pada mulanya dadah tersebut tidak ada dalam kereta.

S. Siapa lagi bersama kamu semasa polis jumpa dadah ganja tersebut?

J. Shawal dengan Boy.

S. Adakah kamu tahu tujuan Shawal bin Hashim bawa kamu ke Genting Sempah pada malam tersebut?

J. Saya tidak tahu, saya hanya mengikutnya sahaja.

S. Sudah berapa lama kamu mengenali Shawal?

J. Lebih kurang lapan tahun sejak tahun 2002.

S. Adakah kamu telah berkahwin dengan Shawal? A

J. Belum lagi, dia hanya kekasih saya sahaja.

S. Mengapa Shawal tinggalkan kamu di McDonald pada malam itu?

B

J. Saya tak tahu, dia beritahu saya yang dia nak jumpa kawannya sekejap dan suruh saya tunggunya di McDonald dan menunggu panggilan teliponnya.

S. Adakah kamu berjumpa sesiapa di dalam McDonald?

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J. Ada, seorang lelaki yang saya tidak kenali.

S. Bagaimana kamu boleh jumpa dengannya?

J. Shawal mengarahkan saya supaya masuk ke dalam McDonald dan dia telah memberikan saya satu telefon bimbit dan menyuruh saya menghubungi nombor tersebut dan seorang lelaki di dalam McDonald telah menjawab panggilan saya, dan saya terus ke meja lelaki tersebut. D

S. Apakah yang kamu bualkan dengan lelaki tersebut?

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J. Shawal memberitahu kepada saya supaya memberitahu kepada lelaki tersebut bahawa 'barang tak boleh naik, kalau nak, jumpa di Tol Gombak'. Kemudian Shawal keluar dari kereta dan berjumpa dengan lelaki tersebut di luar McDonald. Kemudian Shawal masuk semula ke dalam kereta dan tinggalkan saya dengan lelaki tersebut di McDonald. F

S. Berapa lama kamu dengan lelaki tersebut menunggu sehingga Shawal muncul semula?

J. Lebih kurang setengah jam.

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S. Siapa bersama Shawal semasa dia muncul semula di kawatan rehat Genting Sempah?

J. Shawal muncul dengan kawan lelaki yang saya kenali dengan nama Boy.

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S. Siapakah nama sebenar Boy?

J. Saya tidak tahu, yang saya tahu panggilannya sahaja iaitu Boy.

S. Sudah berapa lama kamu mengenali Boy? I

J. Baru sahaja lebih kurang tiga bulan.

S. Dimana kamu mula kenal dengan Boy?

J. Dia ke rumah saya berjumpa Shawal.

S. Apakah pekerjaan Boy sepanjang kamu mengenalinya?

J. Setahu saya dia menguruskan kedai makan keluarganya di Kg. Puah.

S. Adakah kamu tahu yang Shawal dan Boy terlibat dengan pengedaran dadah ganja?

J. Saya tidak tahu, yang saya tahu mereka hanya menghisap ganja.

S. Di manakah mereka selalu menghisap ganja?

J. Di dalam rumah saya.

S. Adakah kamu juga menghisap ganja?

J. Tidak, saya hanya makan pil Eramin 5.

S. Bila kali terakhir kamu makan pil Eramin 5?

J. Pada hari kejadian jam lebih kurang 6 petang.

S. Dari mana kamu mendapat bekalan dadah tersebut?

J. Saya beli sendiri dari seorang kawan di tempat kerja lama saya.

S. Adakah kamu pernah ditangkap polis sebelum ini?

J. Pernah, kes dadah juga tahun 2006 kes urine.

S. Adakah semua percakapan yang kamu berikan semuanya benar?

J. Ya, semuanya benar.

S. Ada apa-apa percakapan yang hendak kamu tambah atau betulkan?

J. Tiada.

Percakapan dibacakan semula kepada suspek dan suspek turunkan tandatangan.

[7] In our considered view taking all the evidence in totality there was nothing inherently incredible about the 2nd appellant's story. There was also lack of elements of the offence in particular custody, control and knowledge. Had the learned judge applied the maximum evaluation test at the prosecution stage in respect of the elements of the offence we are of the considered view that the defence ought not to have been called for the 2nd appellant. And if the learned judge had properly addressed his mind to the maximum evaluation and beyond reasonable test at the end of the defence case the only result will be an acquittal for the 2nd appellant. (see *PP v. Mohd Azzid Abdullah* [2008] 1 MLJ 281).

[8] It is pertinent to note that the apex court had repeatedly asserted that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence or for that matter a story by the accused to reach a just result. (see *Tong Kam Yew & Wang Wee Cheng v. PP*, Cri A No: B-05-63-2011 (20-03-2013)).

[9] In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, the Supreme Court had *inter alia* stated:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 examine whether even though the Court is not satisfied with the defence story, to ask whether in spite of this, the defence **story casts a reasonable doubt on the prosecution case**. (emphasis added).

It must be noted here that even though *Radhi*'s case involved trafficking and it is well settled that defence to rebut trafficking must be on the balance of probabilities the threshold requirement to reach that legal burden is not high and it will be sufficient if the defence story creates a reasonable doubt on the prosecution case, as advocated in *Radhi*'s case as well as by Justice Gopal Sri Ram in the case of *Sochima* which is set out below.

[10] The hallmark of any criminal judgment in the administration of criminal justice depends largely on weighing the defence story in the right perspective with that of the evidence of the

A prosecution. This is so because of the special constitutional protection given to the accused under art. 5(1) of the Federal Constitution which reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

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[11] The proposition and the direction in Radhi's case have now reached the status of law in the Administration of Criminal Justice. In *Sochima Okoye v. PP* [1995] 3 CLJ 371; [1995] 1 MLJ 538, Justice Gopal Sri Ram JCA (as he then was) had this to say:

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> We agree with Encik Karpal Singh that the judgment when read as whole reveals no separate exercise as that postulated by the decision in Radhi. We also agree with his submission that the use of the plural expression 'presumptions' by the learned judge in the passage we have reproduced a moment ago does not amount to a sufficient compliance of what we will call 'the Radhi direction.

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> The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to **whether there was any reasonable doubt raised that Smith was the real trafficker**. (emphasis added). Had he done so he may well have held that he was not, in which event our task would have been made that much easier.

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> Unfortunately he did not and it is our view that the failure by the learned judge to administer unto himself the Radhi direction renders his ultimate conclusion fatally flawed. In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a judge to a jury. *Rameshwar v. State of Rajasthan* AIR 1952 SC 54; *Tan Yook Suan v. R* [1954] MLJ 116 and *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:

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> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to

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a misdirection, for in the words of Pickford J in *R v. Bundy* 5 Cr App R 270 : '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.

> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned deputy fairly, and quite properly, conceded that the learned judge was duty bound, in the light of his earlier finding, to administer unto himself the Radhi direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

[12] Failure to strictly comply with *Radhi*'s direction by the trial court in assessing the defence case will in actual fact make the judgment nothing but a piece of scrap paper in the light of art. 5(1) of the Federal Constitution and s. 182A of the CPC. (see *Zulkifli Md Rozi v. PP*, Cri A No. P-05-424-2010 (Unreported) (22-02-2013); *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[13] In the instant case we agree with the prosecution that the learned judge had fairly and justly weighed the evidence of the 1st and 3rd appellants' defence to reach a just result. However, the judgment in respect of the 2nd appellant is in breach of *Radhi*'s directions for reasons we have stated earlier and for all practical purpose it is not a safe judgment. (see *Thenegaran Murugan v. PP* [2013] 2 MLJ 855).

[14] In consequence the conviction and sentence against the 2nd appellant is set aside and the 2nd appellant is acquitted and discharged. The 1st and 3rd appellants appeal is dismissed and their convictions and sentences affirmed.